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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 767

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

MID-CONTINENT PETROLEUM CORPORATION, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

SINCLAIR REFINING COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

PHILLIPS PETROLEUM COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

SKELLY OIL COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

THE TEXAS COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

CITIES SERVICE OIL COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

BARECO OIL COMPANY, a Corporation,
Petitioner,

vs.

STATE OF MINNESOTA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Whether gasoline shipped from Oklahoma, Kansas and Missouri to the terminus of the Great Lakes Pipe Line Company in Ramsey County, there to be processed and manufactured into a marketable product—then to be stored indefinitely to await the receipt of orders from the petitioners' bulk stations or contract customers, 75% of which come from Minnesota—has come to rest so as to have a situs for taxation.

STATUTES INVOLVED.

The statute under which the tax in question was levied is Minnesota Statutes 1941, Section 272.01 (Mason's Minnesota Statutes 1927, Section 1974 and reads as follows:

> "All real and personal property in this state, and all personal property of persons residing therein, including the property of corporations * * *, is taxable, except such as is by law exempt from taxation;"

Also Minnesota Statutes 1941, Section 273.01 (Mason's Minnesota Statutes 1927, Section 1984), which reads as follows:

> " * * * personal property shall be listed and assessed annually in reference to its value on May 1 * * *".

Also Minnesota Statutes 1941, Section 273.02 (Mason's Minnesota Statutes 1927, Section 1985), which reads as follows:

> "If any * * * personal property be omitted in the assessment of any year or years, and the property thereby escapes taxation, when such omission is discovered

the county auditor shall enter such property on the assessment and tax books for the year or years omitted; and shall assess the property, and extend against the same on the tax list for the current year all arrearages of taxes, properly accruing against it * * *".

STATEMENT.

Petitioners, in order to provide a large stock of gasoline from which to supply bulk stations in the Northern area, made shipments of a minimum of 50,000 barrels each (2,100,000 gallons) via the Great Lakes pipeline to its tank farm at the terminal in Ramsey County consigned to themselves as consignees. (Finding No. 4, R. 887, f. 2661; finding No. 14, R. 989, f. 2693; R. 300 and 301, f. 900-902; R. 414, f. 1240, 1241; R. 994, f. 995). As the gasoline reached the terminal it was allocated to the several shippers by the Great Lakes. (Finding No. 12, R. 894, f. 2682; finding No. 15, R. 989, f. 2694).

Further movement of the gasoline by rail could not be undertaken, not because tank cars were unavailable (R. 1002, f. 1005), but because (1) the gasoline was not then a marketable product—and Great Lakes was required to blend the gasoline with various products including tetra ethyl lead (Finding No. 8, R. 891, f. 2672-2673) resulting in production of 26 different kinds of gasoline, the latter operation requiring originally 16 to 24 hours, but in later years, six hours (R. 897, f. 2689, Finding No. 12d) and (2) to retain the gasoline in storage until petitioners gave shipping instructions. (Finding No. 12, R. 894, f. 2682). Reshipment was not made until petitioners received orders from their own or customers' bulk stations or for "spot"

sales. 75% was shipped to points in Minnesota (R. 992-993, f. 993, Finding No. 17, R. 900, f. 2699-2700).

When the gasoline was delivered to Great Lakes, neither the shipper or carrier knew to whom any part thereof was destined. The only destination known or ascertainable was the pipeline terminal. Ultimate destination was unknown until after orders were received (Finding No. 14, R. 898, f. 2693; R. 300-301, f. 900-902; R. 414, f. 1240, 1241; R. 994, f. 995).

The taxes in question were non-discriminatory. (R. 994, f. 996).

Other undisputed material facts, not mentioned in the trial court's findings, but which must be considered in determining the purpose of the interruption are:

Indefinite storage was contemplated. The tariffs permitted 90 days free storage at the terminal. (R. 874, f. 2622). The tank farm at the terminal had a capacity of 621,000 barrels (about 26,000,000 gallons) (R. 535, f. 1604, R. 991, f. 992). The average storage of shipments was 35 days (R. 307-308, f. 921, 922; R. 992-993, f. 993-994).

The gasoline in stock at the terminal was not committed to the first orders to be received. The traffic department of each petitioner reserved the right to determine as it received orders, whether they should be filled from the terminal stock or from the stock at one of its refineries. (R. 272-273, f. 816-818; R. 633, f. 897-898; R. 638-639, f. 1914-1916; R. 687, f. 2060; R. 688, f. 2062; R. 695, f. 2084; R. 761, f. 2283; R. 788, f. 2362; R. 806, f. 2416; R. 824, f. 2470).

During the winter months, petitioners, encouraged by Great Lakes, made shipments beyond their requirements

in order to keep the pipeline employed and to build up stocks at the terminal for busier seasons. (R. 315, f. 943).

The Interstate Commerce Commission in evaluating Great Lakes properties for rate making purposes determined:

> "This extra handling of gasoline is a manufacturing or trade service rather than a transportation service. Accordingly, all property owned by the carriers and used in blending gasoline has been classified in this report as owned but used for purposes other than those of a common carrier." (R. 850, f. 2548; R. 992, f. 993).

The tank cars were furnished by petitioners. Railroads do not provide them (R. 604, f. 1810-1811). The shipment by rail is made as a separate shipment under a regular bill of lading. (R. 993, f. 994.)

The railroads were not parties to the arrangements whereby Great Lakes made rebates to petitioners to equalize its rates with the all-rail rate. (R. 611, f. 1833).

Shipments for Phillips, Texas and Sinclair were shipped and stored separately and were not commingled (R. 500, f. 1500; R. 517-518, f. 1551-1552).

The State Supreme Court concluded that the gasoline came to rest at the tank farm and rejected trial court's finding No. 18 (R. 900-901, f. 2700-2701) that the interruption at the terminal and the blending operations were not intended to serve the business purposes of petitioners but were designed and intended to facilitate operation of the pipeline because such findings are "opposed to the undisputed facts and are but inferences in the nature of conclusions made by the trial court by applying to them what it conceived to be applicable rules of law. Such findings are not entitled to any more weight than a conclu-

sion of law made by the trial court." (R. 1003-1004, f. 1006-1007).

ARGUMENT.

I.

JURISDICTION.

Jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code (28 USCA, Section 344) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court (Rec. 990) violates the commerce clause of the United States Constitution. It is not shown that the question has not heretofore been determined nor is it claimed that the decision is in conflict with the holdings of this court. *They merely express a doubt. But cite no decision upon which they rely.* On the other hand respondent cites in this brief ample authority to prove a complete accord with such decision.

That the gasoline was in storage with the pipeline for processing and to await receipt of orders at the time the tax was levied does not present a new question. A state tax was sustained under the same circumstances in *Phillips Pipeline Co. v. State,* 302 U. S. 642, 82 L. Ed. 499, affirming 339 Mo. 459, 97 S. W. 2nd 109; and *Susquehanna v. South Amboy,* 228 U. S. 665, 57 L. Ed. 1015. Cf *Chicago, Milwaukee & St. Paul Ry. Co. v. Iowa,* 233 U. S. 334, 58 L. Ed. 988, where the coal was still in the railroad car.

State taxation of property moved by pipeline is not new to this court. *Phillips Pipeline Co. v. State,* Supra; *Eastern Ohio Gas Co. v. Tax Commission,* 283 U. S. 468, 75 L.

Ed. 1171. The test as to when interstate commerce ends and intrastate commerce begins is the same regardless of the means of transportation.

Whether the findings of fact which are mixed findings of fact and conclusions of law or purely conclusions of law are binding upon the State Supreme Court is a state question. The State Supreme Court determined that it is not binding. (R. 1003-1004, f. 1006-1007.) This court is concerned only with findings and conclusions sustained by the State Court and whether such findings or conclusions have support in the record. That the decision of the court is so supported is conceded in the dissent:

> "Careful examination of the voluminous testimony indicates that the trial court might have found that such delays and interruptions were for the benefit of the shipper rather than the carrier and hence the oil stocks were subject to local taxation." (R. 1009, f. 1012)

II.

The blending and storage of gasoline at pipeline tank farm served the business purposes of the petitioners.

The court's decision that the property came to rest at the tank farm so as to become a part of the mass of property within the state and subject to state taxation was founded upon the ground that before the shipment to further destination could be made, the gasoline had to be processed and manufactured into a marketable product and then stored at the tank farm for an average of 35 days while awaiting the receipt of orders. In other words, the tank farm was made a facility of business for the benefit of the peti-

tioners. Among the benefits resulting to petitioners were the following:

1. *It resulted in a tremendous savings in capital investment because it reduced to a very large extent the number of tank cars required to serve its customers.*

The railroads do not provide tank cars. The haul by rail from Kansas City to St. Paul is six days. (Finding No. 14, R. 898, f. 2693) Therefore each tank car would be enroute twelve additional days more than when the movement by rail is from the terminal, which is probably twenty-four hours from any point of delivery.

2. *It provides greater flexibility in operation of refineries and distribution of gasoline.*

The tankage facilities of each petitioner are increased by such facilities at the pipeline tank farm. When an order is received, the traffic department of petitioners have a choice in that they are free to determine whether the order should be filled from the stocks at one of the refineries or from the stocks at the terminal—*and the decision was not made until after the receipt of the order.* Thus when the refineries are stocked to capacity or near capacity, an order could be shipped by all rail—otherwise from the tank farm.

3. *It provided a supply depot close at hand to all customers in the northern area.*

Tankage facilities of bulk stations is limited. (R. 891, f. 2671) All customers are within twenty-four hours reach of the pipeline tank farm and can be readily supplied in any emergency.

4. *Petitioners save the labor costs by having blending with tetra ethyl lead and other products done at the pipeline terminal.*

5. *The tank farm provides a convenient place to make distribution of the bulk shipments via the pipeline into the smaller allotments to be shipped to the bulk stations after orders have been received.*

The essence of petitioners' claim is that the blending activities at the terminal were necessary to facilitate transportation—to make it possible to transport greater volume than if the blending were performed in advance of shipment. Therefore interruption of the movement for this purpose was incidental and excusable. Our answer is that:

1. The gasoline could have been transported beyond the terminal without blending—but that would not serve the business interests of petitioners;

2. Blending of fluids constitutes manufacturing (*Murphy v. Arnson,* 96 U. S. 131); and manufacturing is a local business subject to local regulation and taxation regardless of its effect upon transportation (*Oliver Mining Co. v. Lord,* 262 U. S. 172; *American Mfg. Co. v. St. Louis,* 250 U. S. 459).

Petitioners fail to mention trial court's finding No. 17 (R. 900) that the gasoline was stored until orders were received. *It cannot be argued that indefinite storage for this purpose facilitated transportation.* There was neither necessity nor purpose to send the gasoline through to the bulk stations or customers by immediate continuity—but to store it to await orders. This certainly served the business purposes of petitioners.

III.

The decision is in accord with the Holdings of this Court.

In every instance when the movement of property in interstate commerce was interrupted to permit processing or manufacturing or storage to await the receipts of orders, the state's right to tax has been sustained by this court.

The identical case is *State v. Phillips Pipe Line Company*, 302 U. S. 642, 58 S. Ct. 53, 82 L. Ed. 495, affirming 97 S. W. 2nd 109. There shipment was made under *identical tariffs*, the gasoline to be blended and processed and stored as in the instant case except that *after such blending, processing and storage, and not before*, the gasoline was transferred to a tank under the control of the shipper and transportation to some 200 cities was thereafter continued by truck instead of by rail. In all other respects the case was the same. It was there held that the interstate movement terminated *upon the arrival of the gasoline at the pipe line terminal* and before the processing, manufacturing and storage commenced.

There as here, it was urged that the blending operation facilitated operations of the pipeline; it would enable them to expand the number of grades of gasoline to be shipped from the terminal and meet railroad competition; that it is dangerous to transport leaded gasoline (which this court found to be untrue in *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 436); that they "would lose custom" in absence of blending. All these claims were considered and rejected. The court held that the blending and storage operations at the terminal, prior to delivery to the shipper

constituted intra-state commerce. As a result the Pipeline Company was subject to the tax.

The case is parallel even if the tax was not on the shipper, since its validity turned upon the property coming to rest as it arrived at the terminal.

The local activities in the Phillips case and in the case at bar present a much stronger basis for state taxation than *Eastern Ohio Gas Co. v. Tax Commission,* Supra.

It seems to us that the following are controlling cases:

Susquehanna Coal Co. v. City of South Amboy, 228 U. S. 665, 668; 33 S. Ct. 712, 714, 57 L. Ed. 1015, 1016,

where it was said of the storage of coal in the yards of the railroad company for the purpose of keeping a supply on hand *to fill anticipated orders* that

> "there was something more than the submission to delay in transportation and the acceptance of its consequences. The situation was made a facility of business,—a business conducted (as here) through agents and employees,"

and

Atlantic Coast Line R. Co. v. Standard Oil Co., 275 U. S. 257, 269; 48 S. Ct. 107, 110, 72 L. Ed. 270, 275,

where oil transported in ships was unloaded into tanks for ultimate delivery to the oil company's bulk stations and contract customers as in the instant case, Mr. Chief Justice Taft said:

> "*There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation.* [to its 123 bulk stations] * * * Everything that is done after the oil is deposited in the storage tanks at the Tampa destination, or at the Jacksonville destination

is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it." (Italics supplied.)

Other authorities supporting this proposition are: *General Oil v. Crain,* 209 U. S. 11, 28 S. Ct. 475, 52 L. Ed. 754. *Chicago, M. & S. T. Ry. Co. v. Iowa,* 233 U. S. 334, 34 S. Ct. 592, 58 L. Ed. 988. *Bacon v. Illinois,* 227 U. S. 504, 33 S. Ct. 299, 67 L. Ed. 615. *So Pac. Co. v. Gallagher,* 306 U. S. 167, 99 S. Ct. 399, 83 L. Ed. 586. *State of Minnesota v. Blasius,* 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131. *State ex rel Burr v. Seaboard,* ALR Code, 92 Fla. 61, 109 So. 656. *Utah Power & Light Co. v. Pfost,* 286 U. S. 165, 76 L. Ed. 1038, and other familiar cases too numerous to mention.

The law governing the facts in this case is so well settled, no purpose would be served in issuing a writ of certiorari.

IV.

The decision is sound.

The decision did not turn upon the problem of moving the gasoline *away from* the terminal but did turn *upon the activities at the terminal tank farm* as a basis for determining that the interstate movement had ended. The Court declared that: (1.) The terminal tank farm is the only destination known. (2.) Interruption was not due to lack of transportation facilities. Rail transportation for further movement was available. (3.) The gasoline could not be moved until processed. It was unmarketable

as shipped. (4.) It had to be stored to await orders. Average storage was 35 days. (5.) It agreed with the Interstate Commerce Commission that the blending of gasoline with tetra ethyl lead and other products, and the indefinite storage thereof was a *manufacturing or trade service and not transportation.* (6.) That this served the business interests of the petitioners.

A. Failure to know ultimate destination in not basis for decision below.

It is one of the many circumstances cited by the Court as evidence of the termination of the interstate movement. The Court said that neither the petitioners nor the carrier *knew* the ultimate destination of the gasoline; and that such *knowledge* was not possible until after *orders* were received. In the meantime the gasoline had to be processed and stored. In all of the cases cited by petitioners the ultimate destination was known at all times. The property was being shipped to *fill* orders *obtained in advance*—and the interruption resulted only from *change of mode of transportation* and while *awaiting the arrival of the means of further transportation.* Only the failure to *designate* ultimate destination in the original bill of lading was excused. But the ultimate destination was at all times ascertainable and known. This was the fact in *U. S. v. Erie R. Co.*, 280 U. S. 94; *Carson Petroleum Co. v. Vial*, 279 U. S. 95 and *Texas & N. O. R. Co. v. Sabine Tram Co.*, 227 U. S. 111. Whereas here, the initial shipment was made *in advance of obtaining orders and had to be stored to await the arrival of the anticipated orders* as in *Susque-*

hanna v. South Amboy, Supra and in *Standard Oil Co. v. Atlantic Coastline R. Co.,* Supra.

Apparently movement by pipeline to provide large stocks at the central distribution point to care for anticipated orders is not unlike movement over water by tanker as in the *Standard Oil* case, Supra.

Another important distinction is to be found in the statement of the Court in the *Carson Petroleum* case, Supra: (p. 100, f. 101).

> "The oil is shipped from the storage tanks in the same condition in which it was received from the tank cars without being treated in any way."

In the case at bar the gasoline is an unmarketable product when it arrives at the terminal tank farm. Upon orders of the petitioners it must be processed and manufactured into a marketable product.

B. Trial Court's finding is not conclusive upon the State Supreme Court.

The Supreme Court declared that the "local activities" at the terminal tank farm served the business purposes of the petitioners and that

> ':"The findings that the processing and storage facilitated interstate transportation are opposed to the undisputed facts and are but inferences in the nature of conclusions made by the trial court by applying to them what is conceived to be applicable rules of law. Such findings are not entitled to any more weight than a conclusion of law made by a trial court." (R. 1003, f. 1006-1007)

Obviously this relates to a matter of local practice which will not be reviewed by this Court. *John v. Paullin,* 231 U. S. 583, 585; *Lee v. Central Georgia R. Co.,* 252 U. S. 109, 119; *Central U. Teleph. v. Edwardsville,* 269 U. S. 190, 194, 195; *American Railway Exp. Co. v. Kentucky,* 273 U. S. 269, 272; *Bell Teleph. C. v. Pennsylvania,* 309 U. S. 30, 32. Certainly the *determination* of the purpose of the interruption is the ultimate *conclusion* to be drawn from the *facts.* If appellate courts were concluded by such a finding by the trial court, appeals would be futile. *Baumgartner v. U. S.,* 322 U. S. 665. If this court has jurisdiction, it extends only to review the decision and to determine whether it has support in the record.

The decision is not in conflict with the *Blasius case,* supra. There the trial court's finding of the shipper's intent was set aside by the State Supreme Court. This was not considered erroneous state practice or error. The conclusion was reversed by this court because it was not supported by the record. In the instant case, even the minority opinion concedes there is adequate support.

No criticism of the court's statement concerning blending of gasoline with tetra ethyl lead is justified since 90% of all shipments were "regular" gasoline (R. 532, f. 1594) which was so blended (R. 525-6, f. 1575-6; R. 528-9, f. 1584-7).

CONCLUSION.

We respectfully submit that petitioners have failed to justify a review on writ of certiorari. It clearly appears that the question has heretofore been determined by this court and that the decision is in accord with applicable decisions of this court.

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